The Central Law Journal.

ST. LOUIS, AUGUST 31, 1883.

CURRENT TOPICS.

The Supreme Court of California in deciding a murder case (People v. Wong Ah Teak) recently said: "A person who has sought a combat for the purpose of taking advantage of another, may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought such combat for such purpose, he may justify the killing on the same grounds as he might if he had not originally sought such combat for such purpose." This decision which was rendered by a divided court, seems to us a very questionable law. The principle certainly is not sound in all the boldness of the above statement. We take it as unquestionable that one who seeks a combat must be held responsible for the natural consequences of his act, and if those consequences are such that the person assailed, so retaliates that the assailant, who has meanwhile experienced a "change of heart," so to speak, is compelled to kill him to save his own life, such killing is not in self defense unless it appears that such change of intent, was not only experienced but was clearly indicated to the person so assaulted. The toleration of any other rule would in a few years produce in our criminal courts an interesting crop of "quickened consciences" and "changed hearts" that shortly would be worthy to rank with the long array of emotional aberrations that is now their chief adornment.

A watchful correspondent has kindly favored us with the following communication:

Editor Central Law Journal:

In No. 7 of Vol. 17 is published a "Leading Article" from Elisha Greenhood, of Boston, Mass., on "The Measure of Interest," and in enumerating the States as to the "Rate after Maturity" of the contract, he cites Indiana among the States where the legal rate only is recoverable after the maturity of the contract, on the authority of Burns v. Anderson, 68 Ind. 202, which overruled Kilgore v. Powers, 5 Blackf. 22. In that he is in error. In Shaw v. Rigby, 84 Ind. 375 (published in June last), Burns v. Anderson, *supra*, and all the cases following it, are expressly overruled, and the rule declared in Kilgore v. Powers, 5 Blackf. 22, is declared and re-asserted to be the proper rule, and numerous cases are cited by the court in harmony with that rule.

J. D. McLAREN.

Plymouth, Ind.

We print the above in the hope that it may have the effect of preventing any of our readers from being misled by the discrepancy noted. We deprecate, however, any criticism of the article in question, and desire to call attention to the fact that the case referred to was not published until June, 1883, after the article was prepared. Besides, even if such were not the case, it seems to us that the responsibility of misquoting so agile a court, which changes its position so frequently and with so much facility, should be borne, in part at least, by the court itself.

On Friday last, Lord Chief Justice Coleridge, of the English Bench, arrived in New York on a visit of pleasure and recreation to this country. During his stay he will be entertained by the American Bar Association.

GARNISHMENT, FUNDS IN THE HANDS OF AN ADMINISTRATOR.

In regard to what may be made the subject of garnishment, the general rule is, that all effects of an attachment debtor, subject to attachment, in the hands of a third person, may be reached by the process; but to this general rule there exists some reasonable and perhaps necessary exceptions. It is well said that no person who receives his authority from the law, and is obliged to execute it according to the rules of the law, can be charged as garnishee in respect to any money or property held by him by virtue of that authority;[1] and further, that when property is *in custodia legis*, it can not be distrained nor interfered with otherwise than provided by law.[2] Money in the hands of an officer, col-

[1] Brooks v. Cook, 8 Mass. 246; Corbyn v. Ballman, 4 W. & S. 342; Colby v. Coates, 6 Cush. 558; Thayer v. Tyler, 5 Allen, 94; Mock v. King, 15 Allen, 66; Hagan v. Lucas, 10 Pet. 400; Woodfall's Tenant's Law, 389.

[2] Watson v. Todd, 5 Mass. 271; Vinton v. Bradford, 13 Mass. 114; Burlingame v. Bell, 16 Mass. 318; Odiorne v. Calley, 2 N. H. 66; Moore v. Graves, 3 N. H. 408; Stout v. Bradbury, 5 Me. 313; Burroughs v. Wright, 16 Vt. 619; Harbinson v. McCartney, 1 Grant, 172; Robinson v. Ensign, 6 Gray, 300; Oldham v.

lected under execution, is *in custodia legis*,[3] and in regard to this subject, Mr. Justice Parker, in Wilder v. Bailey,[4] says: "When an officer receives money upon an execution, the law prescribes his duty in relation to it. He is not bound to pay it over to the creditor until the return day of the execution. From his receipt of it until that day, it is not the creditor's money, but is in the custody of the law."[5] In Illinois it is held that garnishment imposes no lien upon property in garnishee's hands, and does not, as such, put the property *in custodia legis*;[6] but *contra* as to garnishment placing property *in custodia legis*.[7] In view of the principle that no person can be charged as garnishee in respect to money or effects held by authority of the law, it is held that money in the hands of an administrator, which will belong to an attachment defendant as distributee, after settlement, is *in custodia legis*, and that the administrator can not be made to answer in garnishment therefor.[8] And the court in Brooks v. Cook,[9] says: "We have determined this in the case of public officers, and the reason of those decisions applies with equal force to the case of an administrator."[10] This custom of London does not lie against executors or administrators, because they are presumed to be ignorant of the contracts made by their testator or intestate.[11] But otherwise, it is said, if the administrator has been, by the proper tribunal, ordered and adjudged to pay a certain sum to a certain creditor against whom attachment proceedings are waged.[12] In Adams v. Barrett,[13] the court considers the Massachusetts doctrine sound, and proceeds to give reasons for the departure of making an administrator subject to garnishment after the order of court; and in Parks v. Hadley,[14] while the court, in view of the statute, charged the administrator as garnishee, yet it recognized the general principle of the exemption of an administrator from garnishment.[15] In some States the original principle is closely followed and the reason for so doing is well argued, and in those States, administrators, as such, are exempt from garnishment after as well as before, order of court;[16] and an administrator against whom an allowance has been made by the court in favor of the creditor of the estate, and ordered to pay him a *pro rata* dividend, is not liable to garnishment at the suit of a creditor of that creditor, in respect of such allowance.[17] In Thorn v. Woodruff,[18] the court quotes from Delaware, Maine, New York and Massachusetts cases in support of its conclusion, and then says: "The reasoning, in all these cases applies to cases of executors and administrators, under our system of laws for settling the estates of intestates, with great force. To subject executors or

Scrivener,, 2 B. Myn. 50; Walker Foxcraft, 2 Me. 270; Lathrop v. Blake, 3 Foster, 46; Thompson v. Marsh, 14 Mass. 269; Richardson v. Griggs, 16 Mo. 416; Waite v. Osborne, 11 Me. 185; Dubois v. Dubois, 6 Cow. 494; Prentiss v. Bliss, 4 Vt. 513; Reddick v. Smith, 4 Ill. 451; Crane v. Freese, 1 Harrison, 305; Hagan v. Lucas, 10 Pet. 400.

[3] Reddick v. Smith, 4 Ill. 451; Clymer v. Willis, 3 Cal. 363; Jones v. Jones, 1 Bland. 443; Dawson v. Holcomb, 1 Ohio, 135; Dubois v. Dubois, 6 Cow. 494.

[4] 3 Mass. 289.

[5] Pollard v. Ross, 5 Mass. 319; Robinson v. Howard, 7 Cush. 257. In further support of this, see the following cases, and cases cited therein: Adams v. Barrett, 2 N. H. 374; Crane v. Freese, 1 Harrison, 305; Hurlburt v. Hicks, 17 Vt. 193; Farmers' Bank v. Beaston, 7 G. & J. 421; Jones v. Jones, 1 Bland. 443; Blair v. Cantey, 2 Speers, 34; Burrell v. Letson, 2 Speers, 378; Marvin v. Hawley, 9 Mo. 382; Pawley v. Gains, 1 Overt. 208; Drane v. McGavock, 7 Humph. 132; Staples v. Staples, 4 Me. 532; Zurcher v. Magee, 2 Ala. 358; Overton v. Hill, 1 Murphy, 47.

[6] Bigelow v. Andrews, 31 Ill. 322.

[7] Biggs v. Kouns, 7 Dana, 405; Brashear v. West, 7 Pet. 608; Mattingly v. Boyd, 20 How. 128.

[8] Mock v. King, 15 Ala. 66; Elliott v. Newby, 2 Hawkes, 21; Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, 5 Ark. 188; Welch v. Gurley, 2 Haywood, 334; Gee v. Warwick, 2 Haywood, 354; Colby v. Coates, 6 Cush. 558; Young v. Young, 2 Hill (S. C.), 425; Brooks v. Cook, 8 Mass. 246; Waite v. Osborne, 11 Me. 185; Coburn v. Ansart, 3 Mass. 319; Marvel v. Houston, 2 Harr. 349.

[9] 8 Mass. 246.

[10] Chealey v. Brewer, 7 Mass. 254; Bulkley v. Eckert, 3 Pa. St. 368; Stillman v. Isham, 11 Conn. 124.

[11] Pinchon's Case, 9 Rep. 87 *b*; Hodges v. Jane, Sti. 199; Oreswick v. Armery, Sti. 228.

[12] Parks v. Hadley, 9 Vt. 320; Curling v. Hyde, 10 Mo. 374; Fitchett v. Dolbee, 3 Harr. (Del.) 267; Richards v. Griggs, 16 Mo. 416.

[13] 2 N. H. 374.

[14] 9 Vt. 320.

[15] Bank of Chester v. Ralston, 7 Pa. St. 482; McCreary v. Tapper, 10 Pa. St. 419; Hess v. Shorb, 7 Pa. St. 231.

[16] Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, 5 Ark. 188; Gee v. Warwick, 2 Haywood 354; Welch v. Gurley, 2 Haywood 334; Marvel v. Houston, 2 Harr. (Del.) 349; Waite v. Osborne, 11 Me. 185; Kimball v. Woodman, 19 Me. 200; Commercial B'k. v. Nealy, 39 Me. 402; Hanson v. Butler, 48 Me. 81; Raymond v. Sawyer, 37 Me. 406; Curling v. Hyde, 10 Mo. 374; Stanton v. Holmes, 4 Day (Conn.) 87; Winchell v. Allen, 1 Conn. 385; Beckwith v. Brown, 3 N. H. 67; Cushing's Trustee Process, p. 57; Note to Stratton v. Ham, 8 Ind. 84.

[17] Fowler v. McClelland, 5 Ark. 188.

[18] 5 Ark. 55.

administrators to this process of garnishment might destroy the whole operation and intention of our law of administrators. We are, therefore, of opinion, that an executor or administrator, as such, is not subject to garnishment." And in Marvel v. Houston,[19]: "The act of the assembly settles the priority of payment of debts in the administration of assetts, and it will not do to allow it to be disturbed in this way. By allowing the debtors of the estate to be garnisheed, the assetts might be diverted from their lawful course of application. Thus, funds applicable to judgment debts might be arrested and applied to simple contract debts. Neither an administrator, therefore, nor a debtor of the estate can be attached, or summoned as garnishee. This is the invariable decision." This basis of reasoning is carried out in Curling v. Hyde,[20] and the court says: "We are, therefore, of the opinion that from principle and analogy, a trustee, or any one acting in a fiduciary character, is not subject to be garnished as such, that the assetts in the hands or possession of a fiduciary, are to be paid out in such manner as the law, prescribing the duties, directs and not otherwise; that a contrary doctrine would inevitably lead to much embarassment, and great inconvenience in the administration of estates." An executor can not be held as the trustee of a legatee, whether he be summoned as such, either before or after the order of probate.[21]

In some States, by statute, all administrators, guardians, executors and trustees, are subject to garnishment,[22] but it may be safely said that where administrators are made subject to garnishment that it is by the peculiar statute of that State. In Wisconsin administrators and executors are not subject to garnishment before the final order for the distribution of the estate, is made, and where he is summoned as garnishee before the making of such order, judgment can not be taken against him, therein, after the order;[23] but whether the administrator would be subject to garnishment after the order of court was not decided in that case. But again it has been said that an administrator holding money, proceeds of a settled estate, is chargeable as trustee, if he be summoned in his personal and not his representative capacity.[24]

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[19] 2 Harr. (Del.) 349.

[20] 10 Mo. 374.

[21] Cushing's Trustee Process, p. 57; Beckwith v. Brown, 3 N. H. 67; Winchell v. Allen, 1 Conn. 385; Stanton v. Holmes, 4 Day (Conn.) 87.

[22] Ind. R. S. 1881, sec. 942.

[23] C. T. Machine Co. v. Miracle, 21 Am. Law Reg. 420; s. c., 54 Wis. ——.

[24] Hoyt v. Christie, 18 Am. Law Reg. 789; s. c., 51 Vt. ——. One who has collected for an executor the amount due on a promissory note, made payable to the executor, as such, is liable to a foreign attachment as the trustee of the executor, in a suit against him, for a demand due from him personally. See Coburn v. Ansoot, 3 Mass. 319.

STRIKES AND STRIKERS IN THEIR LEGAL ASPECT.

Since the days when the laborers in the vineyard murmured because "they likewise received every man a penny," the sanction which breathes from the parable to the claim of the hirer of labor to do what he will with his own, so long as he fulfils legal contracts and does nothing unlawful, has been accepted as just, and as supporting a truth which has become an axiom both of political economy and of law. Yet the telegraph operators, who, at this writing, are obstructing for their own purposes a most important channel of business communication, and subjecting the citizens of this country and the United States to the inconvenience and loss entailed by a general strike, seem not to be of this opinion. "The companies are paying large dividends," say the strikers, "let them therefore pay us higher wages, or we will ruin their business."

It might not be difficult for the political economist, adverting to the history of strikes in general and their uniform result, to prove to these strikers (if they would hearken to him) that their concerted action in this instance is calculated to result in injury rather than in permanent benefit to their craft at large. The scope of this article, however, will be confined to a brief survey, from a legal point of view, of the relations in which the parties engaged in this struggle stand to each other.

Telegraph companies are common carriers of messages, and much of the law relating to common carriers applies to them; they are subject to all rules which are in their nature

applicable to all classes of common carriers.[1] In fulfilling their duties they must employ care and attention; and, as a learned writer remarks, the word "care," when referring to what is required of them, and when the important and delicate nature of their business is considered, necessarily means great care, such care as would not be exacted of ordinary carriers of merchandise.[2] They are held responsible, not only to the sender of a message, the only person with whom they directly contract, but, also, in many cases, to the receiver.[3] In England and in many of the States of the American Union, they are held liable for the default of other companies whom they employ to transmit their messages, and whose action in such transmission they are unable to oversee and, to a great extent, powerless to control.[4] They are public servants, and can neither refuse messages properly tendered them for transmission, nor give preference to one customer's business over that of another. They must send forward messages in the order in which they receive them; and in Ontario this duty is made obligatory by statute under a penalty for its infraction.[5] They must employ competent operatives, and they are responsible for delays as well as mistakes of transmission.[6] Even their assumed power to limit their liability to senders of messages by special written stipulations has, in the absence of statute, been doubted, and such stipulations have been held valid only so far as the court trying the issue may adjudge them reasonable.[7] The charters of telegraph companies usually limit them also as to the rates they shall charge.

[1] Shearman & Redfield on Negligence, 554; but see Breese v. United States Telegraph Co., 45 Barb. 274; Baxter v. Dominion Tel. Co., 37 U. C. R. 482.

[2] Shearman & Redf. Neg. 557.

[3] Ross v. United States Tel. Co., 3 Abbott's Pract. Rep. (N. S.) 408; Playford v. United States Tel. Co., L. R. 4 Q. B. 706; Lane v. Cotton, 12 Mod. 488.

[4] De Rutte v. New York, etc. Magnetic Tel. Co., 1 Daly, 547.

[5] Davis v. Western Union Tel. Co., 1 Cincinnati Sup. Ct. 100; R. S. Ont., cap. 151, sec. 3.

[6] Landsberger v. Magnetic Tel. Co., 32 Barb. 530; Stevenson v. Montreal Tel. Co., 16 U. C. R. 530; Kinghorne v. Montreal Tel. Co., 18 U. C. R. 60; Birney v. New York, etc. Printing Tel. Co., 18 Md. 341; Western Union Tel. Co. v. Ward, 23 Ind. 377; Bryant v. American Tel. Co., 1 Daly, 575; United States Tel. Co. v. Wenger, 55 Pa. St. 262; Squire v. Western Union Tel. Co., 98 Mass. 232; True v. International Tel. Co., 60 Me. 9.

[7] Western Union Tel. Co. v. Carew, 15 Mich. 525; Wolf v. Western Union Tel. Co., Allen's Tel. Cas. 463.

The responsibility which the companies rest under to forward messages with promptness and accuracy is very heavy, and apparently trivial mistakes or unimportant delays may result to them in large verdicts for damages.

It is thus apparent how great is the danger to which a wide-spread and unexpected strike of their employees may expose them. In the trial of actions against them for damages, the merits of any misunderstanding which may have arisen between them and their servants form no part of the inquiry; the companies are strictly held to their duty to the public to be at all times prepared to receive and transmit messages with ordinary promptness and accuracy, and their failure so to do, from whatever cause arising, is at their own risk. Such is the legal position of the companies. Let us now turn to that of the strikers, as members of a trade union and as individuals.

Trade unions are at the present day recognized by the statute law. In former times, at the common law, to form combinations of workmen for the purpose of restricting and controlling the free disposal of labor, and for supporting strikes, was held illegal, because operating in restraint of trade.[8] "Such combinations," says Hannen, J., "can not create any mutual obligation, having the legal effect of binding each other not to work and not to employ unless upon terms fixed by the combination."[9] The common law showed no partiality towards one class or another, and recognized no class, equally discountenancing improper contracts, whether made between masters[10] or workmen.

While, in later times, statutes have been passed in reference to these subjects, yet these statutes will be found to be, to a great extent, simply declaratory of rights which were in existence prior to their adoption, the chief benefit of the statutes being to introduce more summary remedies. Thus, interfering with, threatening or molesting workmen, always gave their employer a right of action against the offending party.[11] So, enticing away and procuring workmen to desert, gave such a right; and it is instructive to note that the measure of damages in these cases

[8] Leake, 741.

[9] Farrer v. Close, L. R. 4 Q. B. 612.

[10] Hilton v. Eckersley, 6 El. & B. 66.

[11] Garrett v. Taylor, Cro. Jac. 567.

was not confined to the loss of service, but that the jury were held to be justified in giving ample compensation for all damages resulting from the wrongful act. [12]

The courts have also interfered by injunction; and in one case of intimidation by a trade union, this remedy was granted to restrain the posting of placards enjoining workmen not to work for the plaintiffs, upon the ground that the action of the defendants tended to the destruction and deterioration of the plaintiffs' property.[13] The court here interfered in a civil case, although the act complained of was a statutory crime.

It was held in another case that an indictment for conspiracy would lie at common law against the servants of a company, under contract of service, who, being offended by the dismissal of a fellow-servant, agreed together to quit the service of their employer without notice, and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business.[14]

In regard to the statutes relating to this branch of law, it is unnecessary to refer to any earlier than the Trade Union Act, 1872,[15] which followed the British Trade Union Act, 1871. It would appear that this act was passed to secure two objects: first, to exempt the members of a trade union from liability to criminal prosecution for conspiracy which they otherwise might incur at common law, where it could be held that the purposes of the union were in restraint of trade and hence unlawful; and to declare not unlawful agreements or trusts between members of trade unions which would be void or voidable at common law for similar reasons; and, secondly, to permit the registration of trade unions the purposes of which are not unlawful, to give power to their trustees to hold the property of the association, bring and defend actions, etc., to fix the responsibillty of such trustees, and to provide a summary means of punishing officers or members for withholding or embezzling moneys or property of the union. To accomplish these objects a statute was necessary, as the common law doctrine as to restraint of trade, though deemed no longer useful or expedient as applying to certain combinations of workmen, was still in force, and required to be partially abrogated; and moreover, difficulty was experienced before the statute in proceeding by indictment or for trespass against defaulting officers, who were generally part-owners as well as trustees, and who hence could not, in many cases, be held liable, save in damages, for the abstraction of property in their hands as such.

The twenty-second section of the act defines the term "trade union" to mean, "such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this act had not been passed, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

The criminal statute, now in force,[16] relating to violence, threats and molestation contains the following provisions:—

1. Every person who wrongfully and without legal authority, with a view to compel any other person to abstain from doing anything which he has no right to do, or to do anything from which he has a legal right to abstain—

1. Uses violence to such other person, or his wife or children, of injures his property; or—

2. Intimidates such other person, or his wife or children by threats of using violence to him, her or any of them, or of injuring his property; or—

3. Persistently follows such other person about from place to place; or—

4. Hides any tools, clothes or other property owned or used by such other person, or deprives him, or hinders him in the use thereof; or—

5. Follows such other person with one or more other persons in a disorderly manner in or through any street or road; or—

6. Besets or watches the house or other place where such other person resides or works or carries on business or happens to be—

Shall be liable to a fine not exceeding one

[12] Hewitt v. Ontario Copper Lightning Rod Co., 44 U. C. R. 28; Lumley v. Gye, 2 El. & B. 216; Gunter v. Astor, 4 Moore, 12.

[13] Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551.

[14] Regina v. Bunn, 12 Cox C. C. 316; See also Walsby v. McAuley, 3 E. & E. 516.

[15] 35 Vict. cap. 30 (D).

[16] 39 Vict. cap. 37 amending 35 Vict. cap. 31.

hundred dollars, or to imprisonment for a term not exceeding three months;

Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

4. A prosecution shall not be maintainable against a person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence indictable by statute or is punishable under the provisions of the act hereby amended; nor shall any person, who is convicted upon any such prosecution, be liable to any greater punishment than is provided by such statute or by the said act as hereby amended, for the act of which he may have been convicted as aforesaid.

Malicious injury to wires, batteries etc., and malicious obstruction of the working of the telegraph in Canada, is made a misdemeanor punishable by imprisonment in any jail for any term less than two years, with or without hard labor.[17]

Any person guilty of a wilful omission or neglect of duty which endangers the safety of any railway passenger, or guilty of assisting therein, is liable to like punishment. Railway operators might be affected by this provision.[18]

To whichever of the participants in the present struggle between the telegraph companies and their operators the sympathies of the public may be extended, or whatever advantage may be gained by one party or the other, it can hardly be doubted that competition alone, must, in the end, be permitted to regulate the amount of compensation due the skill and labor of telegraph operators as of all other wage-workers. The strikers must thus necessarily—and in no spirit of antagonism to the often poorly paid operatives be it said—fail to obtain any enduring fruit of the struggle and privation they have borne with so much cheerfulness and, withal, moderation. To annul permanently the effect of an economic law as infallible in its operation as any physical law, may well be deemed a hopeless undertaking. — *Canadian Law Times.*

[17] 32-33 Vict. cap. 22, sec. 41.
[18] 32-33 Vict. cap. 20, sec. 33.

NEGLIGENCE—LIABILITY OF OWNER OF PREMISES.

PARKER v. BARNARD.

Supreme Judicial Court of Massachusetts, Suffolk, May, 1883.

Under a statute providing that the openings of hoistways, elevators or well holes shall be provided with and protected by a good and substantial railing, and good and sufficient trap-doors, and imposing a penalty for a violation of its provisions, an owner of premises is liable for an injury occasioned to a policeman who, while attempting to examine said premises in the discharge of his duties, has been precipitated into an elevator-well not having such guards.

Price & Peabody, for the plaintiff; *G. A. A. Pevy*, for the defendant.

DEVENS, J., delivered the opinion of the court:

The plaintiff was a police officer of the City of Boston, acting under a rule regularly passed by the police commissioners, which made it his duty to examine in the night time the doors and windows of dwellings and stores, to see that they were properly secured, and to give notice to the inmates; or, if such buildings were unoccupied, to make fast the doors and windows found open. He crossed the threshold of the elevator entrance of the building of which the defendants were owners or occupants, the doors of which were open, for the purpose of making an examination, thinking it was the entrance to the upper stories, in order that he might be in from the air and then light his candle, and was precipitated down the well of the elevator, which was unguarded, receiving injury thereby. It is found by the report that he entered with the honest belief "that there might be something wrong being done in the building, and with the honest purpose of arresting offenders if he found any, or of securing the doors for the safety of the property of the occupants." "It is a very convenient rule of the common law," says Chief Justice Gray, "that an entry upon lands to save goods which are in jeopardy or being lost or destroyed by fire, water or other like danger, is not a trespass." Proctor v. Adams, 113 Mass. 376, and authorities cited. An individual may thus enter upon the land of another; firemen may do so for the protection of property; officers of the law for similar purposes, and under proper circumstances for the arrest of offenders or the execution of criminal process. The right to do this may be in limitation of the more general right of property which the owner has, but it is for his protection and that of the public. Metallic Compression Co. v. Fitchburg R. Co., 109 Mass. 280; Hyde Park v. Gay, 120 Mass. 593; Commonwealth v. Tobin, 108 Mass. 429; Commonwealth v. Reynolds, 120 Mass. 196; Barnard v. Bartlett, 10 Cush. 501. When doors are left open in the night time, under such circumstanecs that property is left unprotected, it is a reasonable public regulation which permits an officer to enter in order to warn the inmates of the house,

or to close and fasten the doors; and a license so to do is fairly implied, which at least should shield him from being treated as a trespasser.

But if the plaintiff was a licensee, it is contended that he was no more than this, that if lawfully upon the premises, he was there at his own risk, and that none of the defendants were under any obligations towards him to keep this entrance or the building in a safe condition. It is certainly well settled that by the common law no duty is imposed upon the owner or occupant of premises to keep them in a suitable condition for those who come upon them solely for their own convenience or pleasure, and who have not been expressly invited to enter or induced to come by the purpose for which the premises were appropriated, or by some preparation or adaptation of the place for use by customers or passengers which might naturally and reasonably lead them to suppose that they might safely and properly enter thereon. When no such preparation is made, or express or implied invitation extended, and the entrance of the licensee is permissive only, there can ordinarily be no recovery for a neglect properly to guard the premises by which such person may be injured. Sweeny v. Old Colony R. Co., 10 Allen, 373; Severy v. Nickerson, 120 Mass. 396.

If this be conceded, it is still to be determined in the case at bar, whether, when there is evidence which tends to show that the injury proceeded from the neglect of an obligation imposed upon defendants by statute, the protection intended to be afforded by means of such a statute, is not for the benefit of all those who are upon the premises in the performance of lawful duties, even if they are but licensees, as well as for that of those who were there by inducement or invitation express or implied, and thus whether such neglect may not be made the foundation of an action. The chapter 260, statutes of 1872, is entitled "An act in addition to an act for the regulation and inspection of buildings, the more effectual prevention of fire and the better preservation of life and property in Boston. Section 5 is as follows: "In any store or building in Boston, in which there shall exist or be placed any hoistway, elevator or well-hole, the openings thereof through and upon each floor of the said building shall be provided with and be protected by a good and substantial railing, and such good and sufficient trap-doors with which to close the same, as may be directed and approved by the inspector of buildings; and such trap-doors shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same. For any neglect or violation of the provisions of this section, a penalty not exceeding one hundred dollars for each and every offense may be imposed upon the owner, lessee or occupant of said building."

The owner or occupant of land or a building is not liable at common law for obstructions, pitfalls or other dangers there existing, or in the absence of any inducement or invitation to others to enter he may use his property as he pleases. But he holds his property "subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the commonwealth, may think necessary for the preventing of injuries to the rights of others, and the security of the public health and welfare." Smith v. Forehand, 100 Mass. 136. When, therefore, in the construction or management of a building the legislature sees fit to direct by statute that certain precautions shall be taken, or certain guards against danger provided, his unrestricted use of his property is rightfully controlled, and those who enter in the performance of a lawful duty and are injured by the neglect of the party responsible, have just ground of action against him. Were the case at bar that of a fireman who, for the purpose of saving the property in the store, or for the prevention of the spread of fire to other buildings, lawfully enters in the performance of his duties, and who was injured, because "there was no railing or trap-door guarding the elevator well," he would have just ground of complaint that the protection which the statute had made it the duty of the owners or occupants to provide had not been afforded him.

The act is not to be limited in its operation to the protection of firemen. "There is no rule," says Mr. Justice Morton," better settled than that the title of an act does not constitute a part of the act." Charles River Bridge v. Warren Bridge, 7 Pick. 455. But if the title were of importance, it is seen by an examination that the object of the act is asserted to be "the preservation of life and property," as well as the "more effectual prevention of fire." The case of an officer who, with lawful process to justify it, enters to make an arrest, or that of one who enters lawfully to protect property, does not differ in principle from that of the fireman, which we have considered. Like him they are within the building in lawful performance of their duty. Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building. The fact that there was a penalty imposed by the statute for neglect of duty, in regard to the railing and protection of the elevator-well, does not exonerate those responsible therefor from such liability. The case of Kirby v. Boylston Market Association, 14 Gray, 249, cited by one of the defendants, does not decide otherwise. It holds only that an ordinance of the city of Boston, requiring abutters, under a penalty, to clear their sidewalks from snow and ice, still left the remedy under statute 1850, ch. 551, for all damages sustained by an accumulation of snow and ice exclusively against the inhabitants of the city in their corporate capacity.

As a general rule, when an act is enjoined or

forbidden under a statutory penalty, and the failure to do the act enjoined, or doing the act forbidden, has contributed to an injury, the party thus in default is liable therefor to the party injured, notwithstanding he may also be subject to a penalty. Kidder v. Dunstable, 11 Gray, 342; Salisbury v. Herscheuroder, 106 Mass. 458; Hyde Park v. Gay, 120 Mass. 589.

We have not considered the respective duties of the owners and occupants of the building as to the protection of the elevator-well. Upon this inquiry the case is not before us, and the facts are not reported.

New trial.

PRINCIPAL AND AGENT — TRUST FUNDS.

PEAK v. ELLICOTT.

Supreme Court of Kansas, July Term, 1883.

Where the principal delivers to his agent money to pay a specific indebtedness, the sum is a trust fund which, if the agent becomes insolvent, does not pass to the assignee for distribution to his general creditors but may be reclaimed by the principal.

Error from Riley County.

Green & Hessin, for plaintiff in error; *Spilman & Brown*, for defendant in error.

Action commenced February 17, 1882, by Matthias Peak against Joseph T. Ellicott, as assignee of the Riley County Bank of Manhattan. The petition, omitting court and title, was as follows:

"The said Matthias Peak, plaintiff above named, complaining of the defendant herein named, shows unto the court: That the Riley County Bank, of Manhattan, Kansas, was, at the time hereinafter named, a corporation created by and existing under the laws of the State of Kansas, and doing and transacting a general banking business in Manhattan, Kansas; that, during the year 1881, J. K. Winchip, deceased, was cashier of said bank; that, on the 12th day of October, 1881, the said plaintiff applied to the said bank, through its cashier, for a loan of $782.50, for the period of four months from that date; that his said application was granted; that he thereupon executed his promissory note in writing of that date, which is in the words and figures following:

$782.50. Manhattan, Kan., Oct. 15, 1881.

Four months after date, for value received, I promise to pay to the order of the Riley County Bank, of Manhattan, Kansas, $782.50, at the Riley County Bank, at Manhattan, with 12 per cent. per annum from maturity until paid.

M. PEAK.

And delivered the said note to J. K. Winchip, cashier of said bank, and received from him the money therefor, less a discount for the period above named; that, afterward, to-wit: On the 22d day of September, 1881, said plaintiff had on deposit in said Riley County Bank to his credit a large sum of money, to-wit: between three and four thousand dollars, and was desirous of drawing the same from said bank, and made application to its cashier for the same; that the said J. K. Winchip, cashier as aforesaid, then asked the plaintiff to pay his said note of $782.50, as above set forth, and thereupon, although the said note was not due, agreed to and with the said cashier of said bank to pay the same; that the said J. K. Winchip, cashier as aforesaid, told the plaintiff that the note was not there, but that he would send and get the same, and thereupon the plaintiff gave him, the said J. K. Winchip, cashier as aforesaid, $782.50, for the purpose of paying and to be applied on said note, and made and gave to plaintiff a receipt against said note, which receipt is in words and figures as follows:

The Riley County Bank of Manhattan, Kansas, Nov. 22, 1881.

Received of M. Peak $782.50 in payment of note for same amount, due February 12, 1882.

J. K. WINCHIP, Cashier.

And plaintiff further complaining says: That at the time said receipt was executed and the money so received by said bank, Riley County Bank was not the owner or holder thereof, but prior thereto had sold for a valuable consideration and had endorsed and delivered said note to the Harrison National Bank of Cadiz, Ohio, who at the time of the transaction set forth, was the owner and holder thereof, and that the said sum of money so paid by him was never transmitted to the Harrison National Bank of Cadiz, Ohio, nor was said note returned to him by said bank; that the said J. C. Winchip, cashier, as aforesaid, by his statements induced said plaintiff to believe that the said bank, of which he was cashier, was still the owner and could control the aforesaid note.

Further, complaining plaintiff says: That on the 15th day of February, 1882, when said note matured, the Harrison National Bank of Cadiz, Ohio, presented said note for payment and said plaintiff was compelled and did pay to the said Harrison National Bank the sum of seven hundred eighty-two 50-100 dollars for the said note, that the sum of money to-wit: Seven hundred eighty-two 50-100 dollars, so paid to the said J. K. Winchip, cashier, was credited to the cash account of the said bank and held and appropriated to its own use.

That on the 26th day of December, 1881, the Riley County Bank of Manhattan, Kansas, made an assignment of all its property and effects to J. W. Blair in trust for its creditors, and that afterwards the said Joseph T. Ellicott was appointed assignee of the bank, gave bond, as required by law, and entered upon the discharge of his duties as such assignee; that as such assignee he has now in his possession property and effects belonging to said bank.

Wherefore, plaintiff asks that the said sum of seven hundred eighty-two and 50-100 dollars be declared a trust fund, and that said assignee be

ordered to pay to said plaintiff the full sum of seven hundred eighty-two 50-100 dollars with interest thereon out of the first money received by him as such assignee, and for such other and further relief as he in equity is entitled."

Thereafter the defendant demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. At the December term of the court for 1882, the case came on for hearing; the demurrer was sustained and judgment entered that the defendant recover his costs; the plaintiff excepted and brings the case here.

HORTON, C. J., delivered the opinion of the court:

The question in this case is whether a trust in favor of the plaintiff is impressed upon the $782.50 delivered to the cashier of the Riley County Bank on November 22, 1881, for the purpose of paying the note of plaintiff executed to the bank, but at that time owned and held by the Harrison National Bank of Cadiz, in Ohio. When the bank, through its cashier, accepted the $782.50, it was not paid by the plaintiff as a deposit, nor accepted by the latter as a deposit, and the relation of debtor and creditor between the bank and the plaintiff was not created by the transaction. On the other hand, as respects this specific sum, the relation between the plaintiff and the bank must be regarded as that of principal and agent. After the bank received this sum to satisfy the note of the plaintiff, the bank held the money in a fiduciary capacity. If the money was not applied according to the understanding of the parties to the satisfaction of the note, it should have been returned to the plaintiff. It was not deposited to be checked out or to be loaned, or otherwise used by the bank for banking purposes, and in law the bank held it as a trust fund and not as the assets of the bank. The defendant, as assignee of the bank, succeeds to all the rights of the bank, but as such assignee, he has no lawful authority to retain a trust fund in his hands belonging to the plaintiff, and which the bank at the time of receiving the same promised and agreed to apply in payment of plaintiff's note. As the money was a trust fund and never belonged to the bank, its creditors will not be injured if it is turned over by the assignee to its owner. Even if the trust fund has been mixed with other funds of the bank, this can not prevent the plaintiff from following and reclaiming the fund, because if a trust fund is mixed with other funds, the person equitably entitled thereto may follow it and has a charge on the whole fund for the amount due. Frith v. Gartland, 2 H. & M. 417, 420.

Counsel suggest: "If there was a trust created, there must have been a *cestui que trust*, and that if any one is entitled to follow and reclaim the money, it must be the owner and holder of the note of plaintiff." It does not make any difference that instead of trustee and *cestui que trust*, the case is one of fiduciary relationship. If a wrong arises out of such relationship, the same remedy exists against the wrong-doer on behalf of the principal, as would exist against a trustee on behalf of the *cestui que trust*. Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal and separated from any money of the wrong-doer. *Ex parte* Dale & Co., 11 Ch. D. 772; Knachtball v. Hallett, 13 Ch. D. 696.

Counsel further suggest that the transaction between the plaintiff and the cashier of the bank was outside of the legitimate business of the bank and if any trust was created, it was with the cashier and not with the bank. Not so. The cashier was an officer of the bank and the petition charges that the fund delivered to him was credited to the cash account of the bank and held and appropriated by the bank to its own use. The knowledge of the cashier under these circumstances, is imputable to the bank and the bank must be held as having notice that the money was received as a trust fund. The relation between the plaintiff and bank as respects the money delivered to the cashier being that of principal and agent, the plaintiff has the right to follow and reclaim it from the assignee. As the bank, in law, held the money as a trust fund, as the agent of the plaintiff, its assignee holds it in like capacity. If the facts alleged in the petition are proved upon the trial, the plaintiff will be entitled to a decree for the amount of the fund claimed, with interest. City of St. Louis v. Johnson, 5 Dill. 241; National Bank v. Insurance Co., 104 U. S. 54 and cases cited therein.

The judgment of the district court must be reversed and the cause remanded with direction to the court below to overrule the demurrer filed to the petition.

All the justices concurring.

INSURANCE —WAIVER OF PROVISION IN POLICY.

FULLER v. PHŒNIX INS. CO.; SAME v. SPRINGFIELD F. & M. INS. CO.

Supreme Court of Iowa, June 14, 1883.

The provisions of a policy of insurance as to the description of the property insured and the ownership thereof can not be waived by parol, so as to make the policy apply to property of persons not named therein.

Appeals from Worth Circuit Court.

These actions are founded upon policies of insurance against loss by fire. The policies are alike in all material respects, and the cases present the same questions, and were submitted upon the same arguments, with the agreement that the decision in this court of one case shall determine the other. The petitions claimed to recover under

the policies for the loss by fire of certain personal property owned by the plaintiffs. There were demurrers to the petitions, which were sustained. Plaintiffs appeal. The facts appear in the opinion.

L. S. Butler and *J. D. Gurnee*, for appellants; *Blythe & Markley* and *Schermerhorn & Wheeler*, for appellees.

ROTHROCK, J.. delivered the opinion of the court:

1. For convenience of statement in the discussion of the questions involved, the two cases will be considered as one. The petition states, in substance, that one Ashem owned or controlled a warehouse in which he was employed in the business of handling, storing and selling agricultural implements on commission for the plaintiffs, and that he also had certain agricultural implements of his own in the said warehouse, and that by virtue of a contract with the plaintiffs, Ashem was to have the goods belonging to the plaintiffs insured, and in pursuance of said contract Ashem applied to the duly-authorized agent of the defendant for insurance upon the goods of the plaintiffs, as well as upon the goods owned by him in his own right; that defendant, by its agent, had full knowledge of the agreement between plaintiffs and Ashem that the goods should be insured by the latter; and that the defendant, by its agent, orally agreed that it would become the insurer to Ashem for the benefit of the plaintiffs on the goods and property belonging to the plaintiffs as aforesaid, as well as upon the goods owned by Ashem in his own right, and that the policy of insurance issued by the defendant was executed and delivered in pursuance of such understanding and agreement.

It is stated in the policy that the defendant insures "L. W. Ashem, of Northwood, Iowa against loss or damage by fire, to the amount of $1,500, as follows: $600 on two and one-half story frame shingle-roof building, occupied by the assured as an agricultural implement warehouse and office, situated on south side of Main street, Northwood, Iowa; $700 on agricultural implements, consisting of harvesters, mowers, sulky-rakes, plows, machinery extras, binding wire, pumps and such other articles usually kept in a retail stock of agricultural implements, and stored therein; $50 on two horses (being $25 on each) in basement of said building; $125 on top buggy, open buggy and harness therein; $25 on office furniture—including fire-proof safe—therein. The plaintiffs are not named in the policy, either as beneficiaries or as owners of the property, or otherwise. The policy, among other provisions, contains the following: "If the interest of the insured in the property—whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise—be not truly stated in this policy, * * * * the policy shall be void." And it is further provided in the policy that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stand upon leased grouud, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." And there is this further provision in the policy: "The use of general terms—or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy—shall not be construed as a waiver of any printed or written condition or restrictive term."

After the property in the warehouse was destroyed by fire, the defendant paid Ashem for that part owned by him, and upon a refusal to pay for the loss sustained by plaintiffs in the destruction of their property, this action was brought. It is contended by counsel for appellants, that Ashem had an insurable interest in the property of the plaintiffs. This proposition may be conceded for the purposes of this case. We do not think it is material whether he had an insurable interest or not, because the fact remains that according to the terms of the policy, he insured no property but his own; and, in order to include the property of the plaintiffs in the policy, it is necessary to show that it was included, either by proof of a waiver of the conditions of the policy, or by proof that a different contract was actually made than that which is expressed in the policy. There are many adjudged cases which hold that certain conditions of a policy of insurance may be waived by parol. These cases include such provisions as the time of the payment of premiums, the production of proofs of loss, the breach of any condition in the policy as against the increase of risk, or the keeping of hazardous goods or the like. See cases cited in Wood, Ins. 832. In this court it has been held that an increase of risk may be waived by an agent by parol. Viele v. Germania Ins. Co., 26 Iowa, 9. That the time for the payment of the premium may be waived. Young v. Hartford Ins. Co., 45 Iowa, 377. Other cases of waiver of conditions in policies need not be stated.

In the case at bar we are asked to go a step further than any case to which our attention has been called, and hold that the conditions of a policy as to the subject of the insurance,—the property insured and the ownership thereof,—may be waived by parol. In other words, we are called upon to allow the plaintiff to maintain an action upon a policy in which they are not named and which by its very terms excludes all property except such as was owned by Ashem in his own right.

The counsel cite the case of Shaw v. Ætna Ins. Co., 49 Mo. 578, as being strongly in point in their favor. In that case the plaintiffs shipped some ice to S. & R. to be sold on commission, and directed the latter to insure it. S. & R. took out a policy in their own names, without indicating the plaintiffs' interest therein, and in was held that the plaintiffs could recover. In that case there was no question about the subject of insurance. There was no mingling of the property of

the assured and that of another person, as in the case at bar.

We are also cited to the case of Anson v. Winneshiek Ins. Co., 23 Iowa 87. In that case, Jane Anson, deceased, owned certain real estate. She was the wife of Milo Anson, and the mother of the other plaintiffs. The agent of the company knew that Jane Anson was dead at the time the policy was issued, and told the plaintiff that the property would have to be insured in her name by plaintiff as her agent. It was held that the policy was not void, and that issuing the policy in the name of Jane Anson would not defeat a recovery by the plaintiffs, who were her heirs. Here again, no claim was made that the policy could be made to cover other property than that described in the policy. It was held that as the company by its agents advised that the policy be written in the name of a person who was dead, it should be estopped from setting up her death as a reason for avoiding the policy.

In Webster v. Manhattan Ins. Co., 59 Pa. St. 227, where a policy of insurance was issued to the plaintiff, one of two partners, upon property of the firm, and it appeared in proof that the agent of the company was informed that the property was owned by the partnership, it was held that the company was liable for the full value of the property. That was a case in which the ownership of the insured was a joint ownership in al the property.

In Peoria Ins. Co. v. Hall, 12 Mich. 202, a contrary rule was adopted. It seems to us that what is sought by the plaintiffs in this case is that they be allowed, under the guise of a waiver of the conditions of the policy, to not only make it cover other property than that described therein, but to make it apply to property owned by parties not named in the policy. This appears to us to be a plain violation of the rule that a written contract cannot be varied by any parol contemporaneous agreement.

2. It is further contended that this action can be maintained because the policy actually covered and included the goods in question as being goods in store in the warehouse. The clause of the policy under which this claim is made is as follows: $700 on agricultural implement, consisting of harvesters, mowers, sulky rakes, plows, machinery extras, binding wire, pumps, and such other articles usually kept in a retail stock of agricultural implements, and *stored therein*." The words "stored therein," which we have italicized, plainly refer to the warehouse and office mentioned in the preceding clause of the policy. The claim of counsel is that in store in the warehouse must be held to include goods deposited therein by others. But here, again, we are met by the positive provisions of the policy that goods held by any other right than that of absolute ownership are not covered by the policy, unless specifically mentioned, and the claim that the words "stored therein" describe property other than that owned by the plaintiff does not appear to us to be well founded. Taking the whole description of the property together, these words are evidently used for the purpose of fixing the location of the insured property, and they mean the same as if the words "kept therein" had been employed instead of "stored therein."

We think the demurrer to the petition was correctly sustained. Affirmed.

GUARDIAN AND WARD — DEPOSIT OF FUND — FAILURE OF BANK.

PARSLEY v. MARTIN.

Supreme Court of Appeals of Virginia, April 12, 1883.

Where a guardian deposited the funds of his wards in his own name in a bank in Richmond, Virginia, in 1859, having no private account at that bank, and never having had moneys of his own on deposit, and, in 1863, when his wards became of age and were entitled to receive their estate, he offered to settle with them by tendering the certificates of deposit, which were refused by the wards, who demanded payment in silver and gold, and the funds subsequently perished in the bank at the close of the war, it was *held*, that the guardian is not responsible for such loss.

Appeal from the Circuit Court of Hanover.

The facts sufficiently appear in the opinion.

John B. Young, for appellant; *Haw & Waddill*, for appellees.

FAUNTLEROY, J., delivered the opinion of the court;

This is an appeal from a decree of the circuit court of Hanover county, rendered in two suits which were consolidated and heard together under the styles of Martin and Wife v. Parsley's Administrator, and Terry and Wife v. Same.

A transcript of the record in these causes discloses the following facts: John P. Parsley, the intestate of appellant, qualified in the county court of Hanover county on or about the 26th of April, 1853, as the guardian of the female appellees, Eugenia E. Turner and George Ella Turner, infants, now the wives respectively of the male appellees, Robert M. Martin and Thomas S. Terry. He received as guardian for each of these wards, who were sisters, the sum of $363.96 on the 26th day of April, 1853, and on the 3d of January, 1854, the further sum for each of $225.62. He loaned this money at interest for three or four years until, in the fall of 1858, $500 of it was paid to him by the borrowers of it who were unwilling to hold it on loan any longer, the money matters of the country being then plenty and easy. He tried in vain satisfactorily to loan this money out at interest until on the 15th day of January, 1859, upon reliable information and advice, he deposited the said $500 at six per cent. interest in the Commercial Savings Bank of Richmond. Afterwards, and during the said year of 1859, the further sum of $1,000 of this money of his wards

was paid in to him by the borrowers of it. Being unable to loan the said money out at interest to individuals upon satisfactory security, he, in like manner as before, also deposited the said $1,000 in the said Commercial Savings Bank of Richmond at six per cent. interest, on the 1st of December, 1859. For both of these deposits in said bank he took certificates of deposit in his own name. He had no money of his own in said bank and no other money whatever there deposited at any time, and he never checked upon said money so deposited or in any way made use or avail of it for any purpose. During the war the bank advertised for the withdrawal of deposits: whereupon he went to the bank and stated to them (the officers) that the money on deposit in said bank represented by the certificates which he held was not his money, but was the money of his wards, and that it would be impossible to put it out at interest or to find a place of safety for it, as his house was within the enemy's lines, and was liable to be pillaged at any moment; and he prevailed upon the officers to let it remain in said bank.

As soon as his said wards were in condition from arrival at age or marriage to receive payment of the money in his hands as their guardian he offered to settle with both of them and offered them these certificates of deposits; their husbands, however, the said Martin and Terry (male appellees here) declined and positively and persistently refused to receive the said certificates, not because of any question or doubt that they represented the money of his wards, but expressly on the insistance that the guardian should pay them in funds equivalent to those in which he originally collected the money from the commissioners of court in 1853 and 1854—that is, in gold or silver or its equivalent.

The said Commercial Savings Bank of Richmond was an institution in full business operation and in good credit; but, like every other bank in the State, it went down with the fall of the Southern Confederacy.

At the February rules, 1867, the said Robert M. Martin and Eugenia E., his wife, filed their bill in the circuit court of Hanover county against the said John P. Parsley, guardian of Eugenia E. Martin, and others, his supposed official sureties, charging that a considerable amount of property, real and personal, had come to the hands of the said Parsley as guardian aforesaid, and praying for a settlement of his accounts as such and for a decree for the balance which should be found due on such settlement.

A similar suit was brought at the same time by the said Thomas S. Terry and George Ella Terry, his wife, against the said Parsley, guardian, setting forth the same charges and asking for similar relief in behalf of the said Terry and wife.

The answer of J. P. Parsley, guardian, was prepared for him and under his direction, but he suddenly died before he had sworn to it. It was adopted and filed as his answer by Wm. M. Parsley, his administrator, who is the appellant here.

At the May term, 1873, of the said circuit court of Hanover, it appearing that all the questions arising in each of these causes were the same, and that the same evidence is applicable to and had been taken in each of them, it was ordered that they be consolidated and thereafter heard together. And it was further ordered that the reports filed in the said causes by the Master Commissioner, Winn, together with all the evidence which had been before the said commissioner or filed in the said causes, should be recommitted with directions to the said commissioner to examine the same and any other evidence that might thereafter be taken or filed by either party and report to the court.

In his report responsive to this order, made November 3, 1875, the said commissioner reported, among other things, that he had carefully examined and considered all the reports and evidence taken and filed in said causes, and that "the funds deposited by John P. Parsley in his own name in the Commercial Savings Bank, as shown by certificate filed with former report, amounting in the aggregate to $1,500, were funds belonging to the female plaintiffs, then wards of said Parsley."

"That the said Commercial Savings Bank was a proper place of deposit for such money, and was such a place as a prudent fiduciary might have made such a deposit at the dates at which said deposits were made by said Parsley."

"That the Commercial Savings Bank has failed, and failed from the results of the late war, the said bank having invested its assets in Confederate bonds or other Confederate securities."

That Mrs. Martin became of age January 1, 1862, and that her husband was a minor when she married him, and did not arrive at age till the 22d of January, 1863; that Mrs. Terry married her husband on the 22d of February, 1863, and became of age March 5, 1865; that it is evident that said Parsley could not settle with either of the said parties until 1863; that if the said Parsley, who was in the enemy's lines at the time the said Commercial Savings Bank gave notice to its depositors to withdraw their funds on deposit in said bank, had withdrawn the said sums at the time of said notice he would have been compelled to have deposited it in some other bank or invested it in Confederate securities; and that he was justified in letting it remain in said bank, especially as his wards were not then of age and he could not pay it over to them; that had the money been withdrawn and deposited in any other bank, or invested in Confederate securities, the result would have been the same.

At the May term, 1878, of the said circuit court of Hanover, the said court, without passing upon the report of the Master Commissioner, taken and filed in the cause responsive to the order and reference by the court either to approve or disapprove the same in whole or in part; and without passing upon any of the exceptions filed by both

plaintiffs and defendants to the said report, rendered a decree against the defendant, to be satisfied out of the estate of his intestate, the said John P. Parsley, deceased, for the balances found due and reported by the commissioner from the said John P. Parsley, guardian, to his said wards, the female plaintiffs, and the costs. From this decree an appeal and *supersedeas* were allowed by one of the judges of this court.

The whole finding and report of the Master Commissioner last made in this cause, in direct response to the order and inquiry of the Circuit Court of Hanover, was in favor of the good faith, legal action and prudent conduct of the guardian; and should, we think, have induced a decision by the court in favor of his non-liability. Upon the general principles applicable to the conduct of fiduciaries under such circumstances and difficulties as environed this guardian, these deposits were a legal and proper disposition of the funds of his wards. No order of court was necessary to enable or authorize him to lend it out. He did so lend it out at interest and it was returned back upon his hands at a time when money was abundant and most difficult of investment. Being thus again in his hands, he did not apply it to his own uses or mix it with his own funds; and, finding it impracticable to loan it out again to advantage, he did the only thing he could properly and safely do, viz.: to put it on deposit in a perfectly safe and reliable bank in Richmond, upon six per cent. interest. This it was his right to do without asking for an order of court; all his duty and responsibility being to see that his choice of a depository was a prudent and safe one. This case is wholly different and distinguishable from the large class of cases in which this court has held fiduciaries responsible who received the money of their *cestuis que trust* in good currency, equivalent to gold and silver, and wholly failed to make any investment of it at the time, but applied it to their own uses; and then, after the war had commenced and the currency had become greatly depreciated have sought to pay it back in such depreciated currency, or by getting orders of court for its investments in Confederate and well-nigh worthless securities, thereby making profit and advantage to themselves.

This guardian made not one cent out of his wards. He deposited their money in a first-class bank at six per cent. interest, just as he received it. He could not pay it to his wards as they were then infants; and he acted prudently, as with his own money and as a court would have ordered or sanctioned if applied to at the time.

A *bona fide* deposit of the money of his wards by the guardian in his own individual name, provided that it can be shown that it was in fact the money of his wards, will acquit and protect the guardian from the responsibility of loss which ensues not by the form or designation of the deposit, but which has been lost by the general and universal destruction of the whole currency and all the banking and financial interests of the State.

That it was the very money of his wards; that he deposited it in good faith as an investment for them though in his own name, as the best and, indeed the only disposition that he could make of it at the time and in the circumstances and surroundings of his situation, and of the State, then actually invaded, over-run and ravaged by a public enemy within whose lines his very dwelling was enveloped— the evidence in the record abundantly proves. This appears by Parsley's answer and deposition and by his declarations cotemporaneously made and proved by the depositions filed in the cause. In Beazley v. Watson, 41 Ala. 234-239, in a case of similar form of deposit by a guardian, it was decided that it was competent to show by parol evidence, in connection with the certificate, that the money deposited was in fact the money of the wards and not of the guardian. And also that the declarations of the guardian, cotemporaneous with the deposit, that the money belonged to his ward, are competent evidence to prove the fact. Bank v. Coleman, 20 Ala. 140; and McTyer v. Steele, 26 Ala. 487.

It is shown by the record that Parsley had no money of his own in said bank or any other dealing with it whatever; that he never checked on this fund or drew the interest; and it would be unreasonable to suppose that he would have deposited this large sum of his own money and let it remain there for years unused and untouched; a sum, too, within reasonable approximation to the very sum then in his hands due to his wards. It was within $23.46 of the amount then due by him to his ward, Mrs. Terry, and within $16.36 of the amount then due to his other ward, Mrs. Martin. That the sums should not have corresponded to a dollar is perfectly reasonable, as he could not have known exactly, until his accounts had been fully stated. He had lent their money out and it had been paid back to him; and just as he received it he deposited it at interest in bank; and not knowing what else to do with it he let it remain where it was; and where too, it is to be remarked, it would have been safe and returnable to him in good currency after the war but for the failure of the Confederacy, the burning of the city of Richmond and the outlawry of all the currency of the State.

In this deposit there was no mingling of this fund with Parsley's own money; it was kept as a special fund; he made no profit and derived no use or advantage from it; he deposited the same kind if not the very same money which he received; he deposited it when he received it. It was lost by no fault or default of his and not because of the form of the deposit (for it would have been equally lost if the deposit had been in his name as guardian).

This case falls directly within the principles announced by this court in the cases of Davis v. Harman, 21 Gratt. 194; Pidgeon v. Williams, 21 Gratt. 251; and in Cooper v. Cooper, decided by this court within the last few weeks.

Cases in which a fiduciary has been held to responsibility for the loss of the money of his ward or of an estate, which had been deposited in his own name, have all been those in which the fiduciary fund was mingled with his own private or personal funds, or used by him for his own purposes, or where the deposit was made in depreciated money, as compared with the money received. This was the case—this the vice which infected the case of Vaiden v. Stubblefield, 28 Gratt. 153; and we believe that no case has ever been decided or recognized as authority in this State which would throw the loss of the fund in these causes upon the guardian, Parsley, or upon his estate. It appears from the record that Parsley laid his vouchers as guardian before a commissioner of the the court in which he had qualified, for the years 1853-1854, for settlement, but that they were lost or destroyed, and his account consequently was not then settled. He did subsequently settle before a commissioner of the said court, who returned his accounts to the court, but the public records of Hanover county were destroyed by fire and by the hands of the public enemy. The guardian, Parsley, in 1853, offered and urged a settlement and payment of his wards' money in his hands to their husbands, Martin and Terry, as soon as they were of age and capable in law to receive it; but they peremptorily refused to receive anything but gold or silver, or its equivalent.

In the case cited of Davis v. Harman, 21 Gratt. 194, the fiduciary, Davis, deposited the fund of his trust in bank in his own name, and it was mixed and merged with his own money and in his private bank account; yet even in that case Christian, J., speaking for the court, said: "We would not be understood as at all disputing the authority of the cases relied upon to show that where a trustee deposits the trust fund with the banker, or in a bank, and does not separate it from his own funds by designating it as the trust fund, and a loss occurs in consequence of such deposit, that loss must fall on the trustees; as, for instance, where the bank fails or the banker becomes insolvent. But in this case these authorities have no application; the loss here was not in consequence of the deposit, but the thing deposited perished, without any default anywhere, by the sudden and irretrievable destruction of the whole currency of a country by the termination of a civil war which had destroyed the very power which created it. Neither the authorities relied upon nor the reason upon which they are founded can have any application to a case like this. It would be too rigorous and unjust; it would be in violation of those well-settled principles, founded in reason and conscience, which control the action of courts of equity, to hold that though the appellant has been guilty of no *mala fides*, no misconduct, no negligence, yet he is to be held responsible for a loss which he had no part in creating and no power to prevent. But that loss, we think, ought to fall upon those who were entitled to the fund that has perished." Upon the review of this whole case and all the questions presented by the record, and the argument of counsel, we are of the opinion that the decree of the circuit court of Hanover complained of is erroneous, and must be annulled and reversed.

Reversed.

LEWIS and RICHARDSON, JJ., dissented.

HOMESTEAD — VOLUNTARY AND INVOLUNTARY EXCHANGE.

SCHNEIDER v. BRAY.

Supreme Court of Texas, Austin Term, 1883.

Though a debtor may exchange exempt property for other property of the kind specifically exempted, and hold the newly-acquired property as exempt, yet a voluntary exchange of exempt property for property not exempt is a waiver of the exemption. But an involuntary exchange will not have such an effect; thus where exempt property is destroyed by fire, the insurance money is exempt.

Appeal from Lamar County.

Dudley and McDonald, for appellants; *Hale and Scott*, for appellee,

WILLIE, C. J., delivered the opinion of the court:

It is well settled in this State that, independent of the provisions of the 16th art. and 52d sec. of the Constitution of 1876, the surviving husband or wife is entitled to hold the homestead after the death of the other spouse, so long as such survivor may choose to occupy it. Blum v. Gaines, 57 Tex. 119; Kepler v. Straub, 52 Tex. 574. By the above cited section of our Constitution, occupancy is expressly required only as against the right of the descendants of the deceased husband or wife, to have the property partitioned and their interests set apart to them. In this case there is no question but that the appellee as surviving wife, was entitled to the homestead occupied by herself and her deceased husband at the time of his death, so long as she chose to reside therein; nor is there any controversy between herself and the descendants of her husband as to her exchange of it for another homestead. The controversy is between herself and her creditors, whose debts accrued subsequent to the exchange, as to her right to have the new residence exempted as against an attachment and execution sued out in satisfaction of such debts. The precise question thus raised is for the first time before this court for decision.

Exchanges made of exempt for other property, are classified by the books into two kinds, voluntary and involuntary, and in reference to each of these, general principles are laid down which are generally concurred in by a majority of the American courts, where questions in reference to such exchanges have been raised. In reference to the first class, it is held by several courts that where

a debtor voluntarily exchanges property specifically exempt from execution for property not exempt, he can not claim exemption for the property received in exchange. Thompson on Homesteads, sec. 745; Andrews v. Raum, 28 How. Pr. 128; Friedlander v. Mahony, 31 Iowa, 315; Scott v. Brigham, 27 Vt. 561; Edson v. Groak, 22 Vt. 18; Wygent v. Smith, 2 San. 185.

The reason of this general rule is well stated in the last case, and is generally adopted and acted upon in the others. This is in effect that "the law designates the species of property it exempts, and does not allow the debtor to choose for himself in respect to the species or kind of property to be exempted. To allow this would be to substitute the choice of the debtor for the provisions of the statute. When the exempt property is voluntarily sold and converted into money or other property not also exempt, the right is gone."

The reason thus given for the rule, proves the rule itself to be that if the property received in exchange is of the class or character not exempt by law, it is subject to execution. It also establishes the converse principle that if the property received in exchange is of the species exempted by law, it will not be subject to execution for the debts of its new owner. This is illustrated by the cases cited above, in which the rule has been enforced. In the case of Wygant v. Smith, a soldier's bounty which was exempt was exchanged for horses and harness which were not exempt. In Friedlander v. Mahony, policies of insurance exempted by the laws of Iowa, were exchanged for merchandise subject to execution, and so with the rest. In all of which cases the unexempted property acquired in the exchange was held liable to execution.

Applying this rule to the articles exempt by our own Constitution, should the horses, oxen, cows, furniture, farming utensils, tools of trade, etc., exempted, be exchanged for money, merchandise or the like, the property thus acquired not being of the classes exempted by our laws, would be subject to execution for the new owner's debts. On the other hand, if horses, cows, furniture, etc., should be received in exchange not beyond the limit prescribed by law, they would not be subject to such execution. A man may exchange his horse for another, or for five head of cattle, if he has none, or his tools of trade for others that suit him better, and no one would think of having such newly acquired property levied on under execution against him. Is the homestead any exception to the general rule on this subject? And if not, why may not a surviving wife holding one by an undoubted right, exchange it for another and hold the latter exempt from execution for her debts? In making the exemptions, our Constitution and statutes selected articles, most certainly, contributing to the ease, comfort and independence of the family. They allow the family a home and its furniture, horses and cattle to labor for them and contribute to their sustenance, and the tools of trade for the head of the family to use in making a support. Should any of these articles become useless, decayed, or not of so much service as would others of the same species, the law does not compel the owner to keep them, but he may exchange them for others of more service to him. Otherwise the beneficent effects of the law would be in a great measure defeated. And so with the homestead. The houses may become untenable and the owner unable to repair them or build others in their place. The land may be barren and the owner unable to make a living for himself or family upon it. He may find a place where he could pursue his trade or calling with profit, which he can not do at his then homestead. The law will certainly not prohibit him from exchanging his home for more comfortable quarters; his barren, for productive land, or fasten him to a place where he must starve, under the penalty that, if he exchanges for the comfort and sustenance of himself and family, he shall sacrifice his home to creditors. And so in the present case we find a woman living all alone at a homestead where she is separate from neighbors who could comfort and protect her in her loneliness, and where she can make nothing for her support, and must, if she depends on her own exertions, eventually starve, but who has an opportunity to exchange the rural homestead for one in town, and receive in addition, a small amount of money; who can probably make a livelihood in the town, and will at least have protection and society there. Is she not to be allowed to make such a desirable exchange? We do not think the law contemplated any such strict confinement to any particular home, provided the new one was within the limit of the exemption, as it was in this case. Creditors have lost nothing by it, for there is no more property withdrawn from their reach than there was before the exchange was made.

In cases of of involuntary exchange of property, the newly acquired article becomes exempt whether it was of a class originally protected from execution or not; as in a case where the exempt property is destroyed by fire, the insurance money received from it is exempt, whereas, money received upon a voluntary sale would not be; and in such cases it makes no difference whether the article destroyed be a piece of personalty or a dwelling house upon the homesead. Thompson on Homestead, sec. 784. This has been decided in our own State. See Fay v. Cameron, 55 Texas 58.

Whilst our decision in this case is not put upon the ground that the exchange of homesteads was involuntary, it might not be considered an altogether voluntary act when a woman in the situation of the appellee, was compelled to make the exchange in order to secure a support, which she could not possibly make at the homestead that she then occupied.

The decision of the court below did not, as appellant supposed, overrule any of the Texas cases cited in the brief.

The case of Whittenberg v. Lloyd, 49 Texas,

633, was made to turn upon the point that the lots in Waxahachie exchanged for others in the same place were not, at the time of the exchange, the homestead of the defendant, but had been previously stripped of their homestead character by abandonment. Besides the property received in exchange was not a homestead either by residence or destination. If the court had intended to hold that the property received in exchange for a homestead was not exempt, there was no necessity for argument to show that the property exchanged was not a homestead. The statement made by the court that it had been held that when exempt property has been voluntarily sold or exchanged the proceeds are not exempt, must be taken with the qualifications attached to it by the very authorities cited to sustain the statement, viz: Where the exchange is for articles not in themselves exempt, such as money, merchandise, etc. So as to the expression that legislation will be required to sustain the broad doctrine that property received in exchange for exempted articles is itself exempt, evidently refers to property which is not in itself subject to execution, for that was the character of the property treated of by the court. In Wolfe v. Buckley, the court would not have resorted to the fact that there had been an exchange of homesteads, if it had actually considered Mrs. Buckley the head of the family, for that in itself would have exempted the property claimed as a homestead from execution. But the court evidently did not rely upon the claim that her step-grandchildren living with her constituted her the head of a family, and evidently laid great stress upon the fact that the place in controversy was bought with the proceeds of a former homestead.

It may be added, too, that if those children, whose father was living and bound for their support, constituted Mrs. Buckley the head of the family, there is no reason why the appellee's own grandchildren, whose father was living, and who were residing with her at her urban residence (as the facts seem to indicate) should not have constituted her the head of a family and given exemption to the homestead as in the case of Wolfe v. Buckley.

It may be added that so enlightened a court as that of Wisconsin holds that money due a debtor from the purchaser of his homestead as a part of the consideration therefor, and which the debtor assigns in good faith to apply to the purchase of another homestead, are not liable to garnishment. Watkins v. Blatchinski, 40 Wis, 347. This was, of course, a voluntary exchange.

The court in deciding the case, in referring to the decisions from Vermont and other New England States, dismisses them with the remark that the courts of those States generally hold to a strict construction of the exemption laws, whereas the Wisconsin courts have uniformly construed them liberally.

The Texas courts have usually adopted the latter rule in their construction of such laws: and in the case of Whittenberg v. Lloyd, *supra*, intimated strongly in favor of the Wisconsin case.

Mr. Thompson, too, in his work on Homesteads, sec. 757, in commenting upon the case, says: "The restriction of the rule to involuntary sales of exempt property has been denied in Wisconsin as it respects the homestead." He explains the decision by saying that in Wisconsin a debtor is empowered by statute to sell and convey his homestead without subjecting it to the demands of creditors; that this would be a barren right if the proceeds of the sale can not be protected while in transition from one homestead to another. He admits that the view is calculated to promote the object of the homestead laws, and that it is applicable in States where a judgment lien does not attach to the homestead so as to prevent the owner and wife from alienating it. It is needless to say that this rule obtains in our own State. If the money in a transition state is to be protected, much stronger is the reason for protecting the homestead acquired by a direct exchange.

For the purposes of this case, it is sufficient to say that under all the facts to be found in the record, we think the appellee's town homestead was protected from the levy of the attachment sued out by appellants, and the judgment below is affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY AND CLIENT — CONFIDENTIAL RELATIONS—FORFEITURE OF COMPENSATION.

The relation of attorney and client gives rise to great confidence, and the attorney is presumed to have the power to strongly influence his client, and to gain by his good nature and credulity, and to obtain undue advantages and gratuities. Hence, the law often declares transactions between them void which between other persons would be unobjectionable. Unless the transaction is fair, it is deemed a constructive fraud. If an attorney fraudulently claims the right to retain out of the money of his client a larger sum than the jury find to be just, he forfeits all claim to any compensation. *Shoemaker v. Stiles*, S. C. Pa., April 16, 1883; 40 Leg. Int. 319.

2. ATTORNEY AND CLIENT — EXTENT OF POWER—DISCHARGE OF DEBT.

The ordinary powers of an attorney-at-law do not authorize him to execute a discharge of a debtor but upon actual payment of the full amount of the debt, and that in money only. *Hamrick v. Combs*, S. C. Neb., May, 1883; 16 Rep. 148.

3. BANK—DUTY OF CASHIER—LIABILITY ON BOND.
The cashier of a bank undertakes to supervise the action of his subordinates in their work in the bank in so far as is consistent with the discharge of his other duties. Though the board of directors periodically examine into the affairs of the bank and reported its condition all right, this did not estop the bank from holding the cashier liable for any fraud perpetrated by a subordinate, if by exercising due care and diligence, the cashier could have prevented such fraud. *Pepper v. Planters' Nat. Bank*, Ky. Ct. App., June, 1883; 2 Ky. L. Rep. & Journ. 85.

4. CONTRACT — CONVEYANCE — VENDOR' LIEN — TRUST.
B conveyed lands to G and wife, who, in consideration thereof, promised to pay, or secure to be paid, to B. the sum of $5,000. G and wife, on the same day, in consideration of the conveyance to them, covenanted, in writing, to support B and his wife and daughter, and to pay certain debts and sums of money. G and wife took possession of the property. *Held*, that B had no vendor's lien for the $5,000; that there was a trust in favor of B and the other person interested in the contract, and the land ought to be charged with that trust; that G and wife ought not to be permitted to impair the security of the *cestui que trusts* for the fulfillment of the several trusts, by the creation of liens beyond such as the court may adjudge to be authorized by the title given and the objects to be attained. *Benscoter v. Green*, Md. Ct. App., April Term, 1883; 10 Md. L. Rec., No. 25.

5. CORPORATION—INTERNAL MANAGEMENT OF FOREIGN COMPANIES—PARTIES.
The bill was filed by T on his own behalf and other *bona fide* stockholders of the "North State Copper and Gold Mining Company," a corporation incorporated under the laws of North Carolina, and doing business in the city of Baltimore, against W and others, to the complainant unknown, as pretended owners, and charging W and the unknown defendants with fraud as to the property of the corporation. *Held*, that all controversies relating to the internal management of a corporation must be determined by the courts of the State by which the corporation was created. That the corporation itself is an essential party to such a suit. *Wilkins v. Thome*, Md. Ct. App., April Term, 1883; 10 Md. L. Rec., No. 25.

6. CORPORATION—LIEN ON STOCK FOR DEBT DUE BY SHAREHOLDER.
There is no such thing as a common law lien on stocks in favor of a corporation for a debt due it by a shareholder. A bank, which is not a bank of issue, can not claim a lien on shares of one of its stockholders by way of set-off for an indebtedness of his to the bank, where there is not a special provision in its charter giving it that right. *Mechanic's Bank of Easton v. Shouse*, S. C. Pa., April 16, 1883; 40 Leg. Int., 326.

7. CORPORATION — STOCKHOLDERS' MEETING — VOTING BY PROXY.
The right of stockholders to vote by proxy is not a common law right. It is not a power necessarily incident to the corporate rights of stockholders. The right of voting at an election of an incorporated company by proxy is not a general right. The party who claims it must show a special authority for that purpose. *Commonwealth v. Bringhurst*, S. C. Pa., April 16, 1883; 40 Leg. Int., 326.

8. CRIMINAL LAW — DEFENDANT'S STATEMENT — CREDIBILITY.
1. The statement of facts which a defendant is authorized to make in his own behalf, under the act approved Dec. 2, 1882 (pamp. acts, 1882 3), is in the nature of evidence and must be submitted to the jury in that character. 2. And while the jury can not arbitrarily discard this statement, it is entitled to only such weight in influencing their verdict as they may in good conscience and justice see fit to give to it. They may apply to it the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses; and the defendant's character if legitimately in evidence may be considered, his demeanor on the stand, etc.; but it is not necessary that it should be corroborated by other independent testimony in order to authorize the jury to believe it. *Blackburn v. State*, S. C. Ala.; 2 Ala. L. J., 179.

9. CRIMINAL LAW — DEFENDANT'S STATEMENT — CROSS-EXAMINATION—COMMENT OF COUNSEL.
Defendants making statements under the act approved Dec. 2, 1882, are not witnesses, nor are their statements strictly evidence, and therefore they are not subject to examination or cross-examination as witnesses are. The jury may apply to such statements all the tests for ascertaining the truth, to which they are allowed to apply the sworn testimony of witnesses, but the defendant can not be impeached as witnesses may. The statements under this statute are a subject of legitimate comment by counsel in addressing the jury. *Campbell v. State*, S. C. Ala.; 2 Ala. L. J., 183.

10. DAMAGES—DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES.
Action by the wife for damages for the killing of her husband. It was admitted by the pleadings that the deceased had, during his life, comfortably supported his wife by his labor, and that by his death she was deprived of that support; that he was sober and industrious. And it was in evidence and not controverted that the deceased was twenty-five years of age, with an expectation of thirty-six years longer; had been a foreman in mines, and that the average pay of foremen was $100 a month. The only issue made by the evidence was that of negligence on the part of defendant and contributory negligence of the deceased. The jury rendered a verdict for one dollar. The verdict was set aside. *Held*, no error. Having found for the plaintiff on the issue of negligence, the verdict should have been for an amount reasonably adequate to the case as presented. *Woodford v. Lyon Gravel Gold Mining Co.*, S. C. Cal., June 8, 1883; 11 Pac. C. L. J., 504.

11. DAMAGES—FALSELY ASSUMING AUTHORITY TO SELL REAL ESTATE.
In an action for falsely assuming authority as agent for a third person to sell and agree to convey land, the plaintiff is entitled to damages for the loss of his bargain, viz., to the difference between the value of the price which he agreed to pay, and the market value of the property at the time when the agreement was made. *Skaaraas v. Finnegan*, S. C. Minn., July 17, 1883; 16 N. W. R. 456.

12. EVIDENCE — CRIMINAL LAW — REASONABLE DOUBT AND PREPONDERANCE OF TESTIMONY.
The defendant Mitchell had testified in the trial of one Taylor for arson that he and Taylor had committed the offense. Mitchell was charged with perjury for having so testified, and, at his trial for perjury, Taylor was placed on the stand as a

witness against him and was shown certain letters alleged to have been written by him, which tended to show the truth of Mitchell's testimony at the arson trial. Taylor denied that he wrote the letters. An expert was called and gave testimony tending to prove that Taylor wrote the letters. The court then instructed the jury that "in order to find that Taylor is the author of these letters you must be entirely satisfied, beyond a reasonable doubt, from the testimony adduced before you in this case." *Held*, error; Taylor was not on trial for perjury. He was a witness and had denied that he wrote the letters, and upon the truth or falsity of this testimony depended the guilt of Mitchell; and that he testified falsely in the case and Mitchell truthfully in the arson case needed only to be proved by a preponderance of evidence. *People v. Mitchell*, S. C. Cal., June 7, 1883; 11 Pac. C. L. J. 506.

13. EVIDENCE — INSTRUMENT IN FOREIGN LANGUAGE—TRANSLATION.
When an instrument written in any other than the English language is sought to be introduced in evidence, it must be translated into English by a competent person having knowledge of both languages. The party offering the paper in evidence must have the interpretation made. *Sartor v. Bollinger*, S. C. Tex., May 8, 1883; 2 Tex. L. Rev. 34.

14. EVIDENCE—PROOF OF HANDWRITING.
A witness may testify as to the handwriting of another when he has seen letters purporting to be in such handwriting and has afterwards personally communicated with the writer respecting them, the party having known and acquiesced in such acts founded upon their supposed genuineness, or where the supposed writer has so adopted them into the ordinary business transactions of life as to induce a reasonable presumption of their being his own writing. *Sartor v. Bollinger*, S. C. Tex., May 8, 1883; 2 Tex. L. Rev. 34.

15. INSURANCE, FIRE—"STORE FIXTURES."
"Store fixtures" in a policy of fire insurance mean those store fittings or fixed furniture which are peculiarly adapted to make a room a store rather than something else. "Store" must be distinguished from "factory," and means a shop or warehouse. *Thurston v. Insurance Co.*, U. S. C. C., D. N. H., June 1883; 16 Rep. 161.

16. JUDGMENT—AMENDMENT AFTER TERM.
This court has authority to amend a judgment after the expiration of a term at which it was rendered, in order to correct clerical errors, or to add an omitting clause necessary to give it effect when there is anything in the judgment by which to amend, but it has no revisory or appellate power over such judgment, and can not, under the guise of an amendment, modify or enlarge a previous judgment so as to make it express something which the court did not pronounce, though it should clearly appear that they should have so decided. *Lorance v. Marchbanks*, S. C. Tex., June 12, 1883; 2 Tex. L. Rev. 44.

17. NEGLIGENCE—BAILMENT.
The defendant James was the secretary of the plaintiff (corporation), and gave bond for the faithful performance of his duties. One of the duties required of him was to pay over all moneys received by him to the treasurer. He permitted moneys to remain in his hands more than one month, and while in his possession they were stolen from him. *Held*, that he was not the custodian of the moneys, and the failure on his part to pay over the moneys within a reasonable time (under the circumstances of this case not later than the next day after the receipt) is such negligence as to render him and his bondsmen liable for the moneys stolen. *Odd Fellows Mut. Aid. Assn. v. James*, S. C. Cal., June 29, 1883; 11 Pac. C. L. J. 494.

CORRESPONDENCE.

THE SUPREME COURT AND THE SUPREME COURT COMMISSION.

To the Editor of the Central Law Journal:

The commissioners appointed by the Supreme Court of Missouri, under the act of March 22, 1883, have completed the labors of their first term. Their work is not sufficiently before the public, their adjournment being so recent, and their opinions—"reports," as they are designated by the statute,—not yet published, to justify the expression of an opinion as to its quality. As to quantity, it is all that could have been expected. They disposed of eighty cases during the short period of ten weeks in which they were in session, and during the greater portion of this time one member of the commission, Charles Winslow, Esq., was incapacitated by severe illness from attendance upon its sessions. The quality of their work can only be inferred from the fact that all of their opinions (with the exception of two, which it is understood involve questions upon which the Supreme Court itself is divided, and which are still under advisement), have been approved by the Supreme Court, and from the deservedly high reputation for learning and accuracy which the members of the Commission, Alexander Martin, Esq., of the St. Louis Bar, Charles Winslow, Esq., of the Jefferson City Bar, and John F. Philips, Esq., of the Kansas City Bar, enjoy. The supreme court is to be felicitated, and the bar and suitors of the State congratulated upon the admirable selection for this important and responsible position made by the court from the bar of the State. Much is expected from this commissioners' court in the future, and this expectation seems to be well justified by their work in the past. Their labors will, no doubt, largely assist the court in catching up with its docket.

At the recent meeting of the Missouri Bar Association, held at Sweet Springs, Mo., the act of the legislature submitting to the people, the constitutional amendment for the re-organization of our appellate system, was unanimously endorsed. There is every reason to believe that it will be adopted by the people. This change in our appellate system, giving an additional appellate court at Kansas City, with the same jurisdiction as that of our St. Louis Court of Appeals, and making all causes within its jurisdiction final, and providing for direct appeal of all cases to the supreme court which must now pass through the

St. Louis Court of Appeals, together with the aid to be expected from the commission, well warrants the belief that the supreme court will be enabled in the near future, to catch up, and to keep up, with its docket.

During the term just closed, the supreme court disposed of one hundred and eighty-five cases heard by it on its own docket, including causes dismissed or otherwise summarily disposed of, making the total number of cases disposed of at the April Term, two hundred and sixty-three. It might seem, upon a superficial view, that the supreme court, composed as it is of five members, should have disposed of a proportionally larger number of cases, as the work of the commission was in the main done by two members. But a consideration of the respective labors of the two tribunals will show that such is not the case.

It must be understood that in the cases passed upon by the commission, "every report shall be promptly delivered to the chief justice, who shall lay the same before the court," and the same must be examined by the court, and approved, modified or rejected.

The examination of these reports of the commissioners, together with the time which must be given to the consultation, in respect to the cases on its own docket, heard by the court, and the preparation of its own opinions, will take the larger portion of two days of every week of the term. This leaves but four days for the hearing of cases by the supreme court. In addition to this, every motion, or order concerning causes which are to be sent to, or are pending before the commission, must be made in the supreme court; and every petition for rehearing of causes disposed of by the commission, must be presented to the supreme court, and considered by it, and argument on rehearing made before the court itself. Moreover, the supreme court has, in addition to its regular docket of cases for hearing, the consideration and disposition of all extraordinary proceedings, such as *mandamus*, *quo warranto*, prohibition, *habeas corpus* and other original remedial writs.

When all this additional judicial labor is taken into the account, it is apparent that the five judges should not be expected to dispose of a much greater number of cases during the term than the three members of the Commission. The labors of the term just closed, both on the part of the Supreme Court and the Commission, have been all that could be fairly expected of them, and justifies the belief that the court will steadily gain upon its docket; and that, when the new appellate system has been inaugurated, it will soon have its docket so in hand that cases can be carried through all our courts to final disposition with as much expedition as in any State in the Union.

St. Louis, Mo. W. L. SCOTT.

RECENT LEGAL LITERATURE.

PARLIAMENTARY PRACTICE. A Hand-book of Parliamentary Practice. By Rufus Waples. Chicago, 1883: Callaghan & Co.

This little hand-book differs from most parliamentary manuals in not being the law of order of any particular assembly, but is founded upon reason and established precedent. The work is well and carefully executed, and can not fail to be of service to those who have occasion to take part in the proceedings of such bodies.

THIRD DELAWARE CHANCERY REPORTS. Reports of Cases Adjudged and Determined in the Court of Chancery of the State of Delaware. Under Authority of the General Assembly. By George H. Bates. Vol. III. Philadelphia, 1883: T. & J. W. Johnson & Co.

This volume is well printed and fairly reported. The chief fault is the very liberal amount of space that is devoted to the argument of counsel. The reporter seeks to apologize for this defect, by saying in the preface that he "is aware that in many cases the merit of the volume would have been enhanced by a compression of the arguments. The intervals, however, afforded by the varied and engrossing occupations of an active prosessional life, for the preparation of these reports, have not sufficed for the increased labor involved in the intelligent abbreviation of the arguments, and it is hoped that their uniform thoroughness and ability will render the reports of them serviceable. It will be apparent that fuller reports of argument are permissible than in jurisdictions where the volume of business makes the issue of reports more frequent and voluminous.

INDEMAUER'S COMMON LAW CASES.—An Epitome of Leading Common Law Cases with some Short Notes thereon; Chiefly intended as a Guide to "Smith's Leading Cases." Fifth Edition, by John Indemauer, Solicitor. American Edition by Charles A. Bucknam and Bordman Hall, Boston, 1883: Soule and Bugbee.

This little book will be found an excellent aid to the student in reviewing his knowledge of the principles of the legal science, and will be available too for a similar purpose to the practitioner whose few moments of leisure will not suffice for a systematic rereading of the original cases. The task of condensation has been carefully and judiciously accomplished, and the notes, both English and American, contain many valuable suggestions.

JONES ON CHATTEL MORTGAGES. A Treatise on the Law of Mortgages of Personal Property. By Leonard A. Jones. Second Edition. Revised and Enlarged. Boston, 1883: Houghton, Mifflin & Co.

Of this second edition of this well and favorably

known treatise, the author says in his preface that the revision has been accomplished by incorporating into the text and notes the new decisions that have been published since the work was first written, as well as some earlier decisions that had been omitted. The book has thus been enlarged by the addition of some sixty pages of new matter; most of this has been wrought into sections as they were originally formed, which retain the same numbers; and only a few wholly new sections have been written for the treatment of new subjects. The number of cases cited has been increased by about three hundred.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The querie must be brief; long statements of facts of particular case must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

65. What is meant by permanent improvements under a statute allowing the defendant in ejectment to recover for permanent improvements? Are improvements to the soil itself of that character by putting on manure and the like, so that land that once produced ten bushels to the acre by such improvements now produces twenty bushels? I. B. H.

Union, Monroe Co., West Va.

QUERIES ANSWERED.

Query 63. [17 Cent. L. J. 140.] A person became a member of "The Knights of Honor," and received a policy or certificate of insurance upon his life, by the terms of which the amount to be paid was made payable on his death "to the order of his will." He subsequently made a will by which he, in substance, directed that the proceeds of the insurance should be invested at interest and should be paid to his children as they arrived at majority, and appointed executors to carry out the provisions of the will, but does not specifically direct by whom the insurance money is to be collected and controlled. He died and his estate is insolvent. Under these facts does the money vest absolutely in the children as beneficiaries of the policy to the exclusion of creditors of deceased, or does it vest in his estate to be first administered and then pass to his children, if at all, only after the debts are paid?

Answer No. 2. The insurance money vests absolutely in the children as beneficiaries, to the exclusion of creditors of the estate. The right of collecting the fund is in the executors, who, for this purpose, are testamentary trustees under the will. If their administration of this trust is likely to become embarrassed by reason of the fact that they are also executors of an insolvent estate, the proper court of equity will protect the trust estate, either by requiring the executors to give separate bonds as testamentary trustees, or by appointing new trustees of this fund in their place. P.

NOTES

——The mayor of a small town in northeast Georgia had Simon Green before him, charged with "disorderly conduct." Green entered "a plea of guilty," whereupon the mayor proceeded to say: "Mr. Green, the charge ag'in you is using obscure and infain language; but as you has plead guilty and flung yerself on the murcy of the court, I'll use as much liniment on you as possible. I'll only found yer one dollar and costs. May the Lord have mercy on your soul."

——"I think Henry L. Clinton is the best technical lawyer in the profession," was the remark of a gentleman often associated with him, in response to a criticism that Mr. Clinton dwelt too much on small points. "He comes near to being what I once heard old Judge Hogeboom describe as a perfect lawyer—'one who could foresee the end of his case.' Clinton sees all there is in the case before he opens it. He will rise at 7 o'clock, eat a breakfast that would kill an ordinary horse, and then climb to his library and work without interruption, and without any more to eat, until midnight. When he gets through, however, there will be nothing more left of the case to find out. Talking of 'small points'," he added, "they are no more to be despised than the day of small things. I once put in among a lot of other, and as I thought strong points, in demurring to an action, one which I believed trivial, setting forth a denial of jurisdiction because a motion set down for hearing on a Saturday was not heard until the following Monday. The Judge threw my opponents out of court on the trivial or small point and never even looked at my strong ones.'

——An illustration of the extent to which, in early days in this country, mere matters of police regulation were permitted to encroach upon the domain of personal liberty, is found in a law passed by the provincial legislature of Pennsylvania in 1696, for "preventing accidents that may happen by fire in the towns of Philadelphia and New Castle." Persons in those towns were forbidden to fire their chimneys to cleanse them, or to suffer them to be so foul that they shall take fire so as to flame out of the top, under penalty of forty shillings for each offense. And each owner of a dwelling-house was obliged to provide and keep in his or her house a swab twelve or fourteen feet long, and a bucket or pail to be always ready against such accidents of fire, under penalty of ten shillings for each neglect. No person should presume to smoke tobacco in the streets, either by day or night, under penalty of twelve pence. All of which fines were to be employed for buying and procuring leather buckets and other instruments or engines against fires, for the public use of each town respectively. Harmony Fire Co. v. Trustees of the Fire Association, 35 Pa. St. 496.